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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5518

ANDRE L. McSHAN,

Petitioner

v.

STATE OF GEORGIA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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I N D E X

	Page
QUESTION PRESENTED.	1
STATEMENT OF THE CASE	2
REASONS FOR NOT GRANTING THE WRIT	5
A MOMENTARY STOPPING OF AN INDIVIDUAL FOR IDENTIFICATION WHEN THAT PERSON'S CONDUCT IS IN CONFORMITY WITH A SET OF OBJECTIVE OPERATIVE FACTS WHICH ARE INDICATIVE OF ONE ENGAGED IN DRUG TRAFFICING DOES NOT CONSTITUTE AN UNREASONABLE SEIZURE OR STOPPING UNDER THE FOURTH AMENDMENT.	
CONCLUSION	13
CERTIFICATE OF SERVICE	14

TABLE OF AUTHORITIES

Cases Cited:	Page(s)
Adams v. Williams, 407 U.S. 143 (1972).	10
Beck v. Ohio, 379 U.S. 89, 91 (1964).	12
Brinegar v. United States, 338 U.S. 160 (1949).	8,9
Brown v. Texas, U.S. , 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).	6,7,9,11
Davis v. Mississippi, 394 U.S. 721 (1969).	12
Delaware v. Prouse, U.S. , 99 S.Ct. 1397, 59 L.Ed.2d 660 (1979).	5,6,7,9
Elkins v. United States, 364 U.S. 206, 222 (1960).	7
Harris v. New York, 401 U.S. 222, 226 (1971).	7
McShan v. State, 150 Ga.App. 232, S.E.2d (1979).	2
Pennsylvania v. Mimms, 434 U.S. 106, 107 (1977).	7
Schnekloth v. Bustamonte, 412 U.S. 218 (1973).	11
Sibron v. New York, 392 U.S. 40 (1968).	11
Terry v. State of Ohio, 392 U.S. 1, 16 (1968).	7,10,12
Torres v. Puerto Rico, U.S. , 99 S.Ct. 2425, 61 L.Ed.2d 1 (1979).	6,9
United States v. Allen, 421 F.Supp. 1372 (D.C. Mich. 1976).	12
United States v. Brignoni-Ponce, 422 U.S. 873 (1975). . . .	8,9
United States v. Lewis, 556 F.2d 386 (6th Cir. 1977), cert. denied, 434 U.S. 985 (1978).	12
United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977). . .	5
United States v. McDaniel, 550 F.2d 214, 217 (5th Cir. 1977).	11
United States v. Mendenhall, No. 78-1821, cert. granted, October 3, 1979, 596 F.2d 707 (6th Cir. 1979).	5
United States v. Riggs, 474 F.2d 699 (2nd Cir. 1973) cert. denied, 414 U.S. 820 (1973).	12
United States v. Scott, 545 F.2d 38 (8th Cir. 1976) cert. denied, 429 U.S. 1066 (1977).	12
United States v. Smith, 574 F.2d 882 (6th Cir. 1978). . . .	12

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QUESTION PRESENTED

Does a momentary stopping of an individual for identification when that person's conduct is in conformity with a set of objective operative facts which are indicative of one engaged in drug trafficking constitute an unreasonable seizure or stopping under the Fourth Amendment?

STATEMENT OF THE CASE

Petitioner Andre L. McShan was indicted by a Fulton County, Georgia grand jury for possession of cocaine, which is a violation of the Georgia Controlled Substances Act. (R. 4-5).[1/] Petitioner waived a jury trial and the court found him guilty as charged. (T. 11; T. 1, 82).[2/] A sentence of two years imprisonment was imposed (R. 12); Petitioner's conviction was affirmed on direct appeal, McShan v. State, 150 Ga. App. 232, ___S.E.2d___(1979); and the Georgia Supreme Court denied a writ of certiorari.

The State's evidence at trial showed that an experienced agent of the Drug Enforcement Administration was observing the deplaning of passengers in Atlanta from a nonstop flight from Miami on March 13, 1978. (T. 3-4, 24). At that time Miami was the most significant cocaine distribution city in the United States. (T. 9, 25).

The agent saw Petitioner deplane, and when Petitioner entered the arrival area, he glanced around the arrival area as if he were looking for plain clothes police officers. (T. 25, 40). As Petitioner walked down the concourse, he kept looking behind him as if to see if someone were following him. (T.25). At the baggage area he seemed to be very nervous, paced about in the small area, and continually looked about at people. (T. 25-26).

At the baggage area he picked up a thin clothes bag, which appeared to contain very few items. (T. 26-27). Petitioner got on the escalator; the agent identified himself to Petitioner and

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1/ Respondent refers to the record prepared for appeal by the Clerk of the Superior Court of Fulton County.

2/ T. refers to the trial transcript.

asked for identification. (T. 27). Petitioner gave him a driver's license in the name of Andre McShan; but the agent then asked for Petitioner's airline ticket which was in the name of Paul Daniels. (T. 28-29). Petitioner said his cousin had bought the ticket for him. (T. 29).[3/] The agent noticed the identification sticker on the clothes bag was in the name of Daniels, and the address on the sticker was different from the address on the driver's license. (T. 30). During this conversation Petitioner's hands were shaking, and he was trying to force a smile. (T. 30).

Petitioner fit the drug courier profile in several respects:

(1) Most couriers are between the ages of 22 and 30; Petitioner was 29 years old at the time. (T. 18, 59).

(2) Petitioner was arriving from Miami, the major cocaine distribution city. (T. 9, 25).

(3) He was extremely nervous. (T. 25-26, 30).

(4) He was carrying a very small amount of luggage. (T. 26-27).

(5) After he got off the plane, he was looking around frequently, as if to spot plain clothes police officers. (T. 25-26, 40).

(6) Petitioner was not traveling under his correct name. (T. 28-29).

[3/] At trial Petitioner admitted the name of Paul Daniels was fictitious. (T. 74).

The agent, who was not in uniform and had no weapon displayed, asked if he could search Petitioner. (T. 27, 31). It is undisputed Petitioner consented to going to the precinct station and consented to being searched, as he testified to these facts. (T. 69, 76).

The airport precinct station was only 40-45 yards from the escalator, and Petitioner was not under arrest when he voluntarily went to the station. (T. 31). The agent did not place his hands on Petitioner nor did the agent even display his weapon. (T. 31).

At the airport precinct station the agent asked Petitioner's consent to conduct the search and advised Petitioner he had the right to refuse the search, but Petitioner still consented. (T. 31-33). In Petitioner's luggage the agent found some marijuana and cocaine having a street value of approximately $5,000.00. (T. 32, 57, 86). At that time the agent placed Petitioner under arrest. (T. 32).

REASON FOR NOT GRANTING THE WRIT

A MOMENTARY STOPPING OF AN INDIVIDUAL FOR IDENTIFICATION WHEN THAT PERSON'S CONDUCT IS IN CONFORMITY WITH A SET OF OBJECTIVE OPERATIVE FACTS WHICH ARE INDICATIVE OF ONE ENGAGED IN DRUG TRAFFICKING DOES NOT CONSTITUTE AN UNREASONABLE SEIZURE OR STOPPING UNDER THE FOURTH AMENDMENT.

This Court has granted certiorari to consider the above question upon application from the United States Attorney in the East District of Michigan in United States v. Mendenhall, No. 78-1821, cert. granted, October 3, 1979, 596 F.2d 706 (6th Cir. 1979). In United States v. Mendenhall, 596 F.2d 706 (6th Cir. 1979), the Court of Appeals referred to an earlier decision of that court. See United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977). In United States v. McCaleb, the persons were detained by agents at the airport and were not free to leave; moreover, the persons were advised that if they did not consent to the search, they would be detained until a search warrant could be obtained. Id. at 719-20. This line of cases is clearly distinguishable from Petitioner's in that he was asked for permission to search and was advised that he could refuse the search.

In several recent decisions this Court has been concerned with the reasonableness of law enforcement activity in stopping individuals either for licensing checks or motor vehicle registration, Delaware v. Prouse, __ U.S.___, 99 S.Ct. 1397, 59 L.Ed.2d 660 (1979), the stopping of an individual solely for identity when there was no reasonable suspicion to believe that

the individual was engaged, or had engaged in criminal conduct, Brown v. Texas, ___U.S.___, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979), and the reasonableness of a statute which permitted a governmental unit to inspect an individual's luggage short of there being any reasonable basis for suspicion that the individual was engaged in any criminal conduct. Torres v. Puerto Rico, ___U.S.___, 99 S.Ct. 2425, 61 L.Ed.2d 1 (1979).

Each of the above cases is distinguishable from the facts in this case which involved the stopping for identity of an individual whose conduct was suspicious in terms of a set of neutral and objective facts which the Drug Enforcement Administration had compiled in connection with individuals suspected of transporting drugs through an airport. This profile is based upon the experience of law enforcement officers with the methods used in drug trafficking. In Brown v. Texas, supra, the law enforcement officers who stopped an individual in an area coming out of an alley where there was known drug trafficking had no reasonable suspicion to believe that, that individual had in fact engaged in any criminal conduct. Likewise, in Delaware v. Prouse, supra, the stopping was a random stopping, and once again there was no reasonable or articulable suspicion that the individual stopped had in fact violated any of the rules of the road in the State of Delaware. Similarly, in Torres v. Puerto Rico, supra, the individual's conduct did not equate with a finding of probable cause to believe that there was any incriminating evidence in his luggage, or that any incriminating evidence would in fact be found. The "drug courier profile" to the contrary does furnish an articulable suspicion.

This Court has long recognized that any stopping by a law enforcement officer which restrains that individual's freedom

is a seizure. Terry v. State of Ohio, 392 U.S. 1, 16 (1968). By the same token, this Court recognized that there was no ready-made test for determining the reasonableness of a search and subsequent seizure other than by balancing the need to seize and search against unwarranted invasions from seizure and search. This is a balancing between public interests and the individual's right to personal security free from arbitrary interference by law enforcement officers. Brown v. Texas, supra; Pennsylvania v. Mimms, 434 U.S. 106, 107 (1977). This balancing is necessary to avoid arbitrary invasions at the unfettered discretion of law enforcement officers. Delaware v. Prouse, supra.

The Fourth Amendment is not a badge behind which criminal activity can be protected, see e.g., Harris v. New York, 401 U.S. 222, 226 (1971), nor does it protect all forms of search and seizure, but only unreasonable searches and seizures. Elkins v. United States, 364 U.S. 206, 222 (1960); Terry v. Ohio, supra at p. 8. This Court in Terry, supra, found that it was not unreasonable under the Fourth Amendment for a law enforcement officer to stop an individual for questioning when that individual had exhibited in the officer's presence conduct which was consistent with the hypothesis that a daylight robbery was contemplated by the individual approached.

> One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest. Terry v. Ohio, supra, at p. 22.

Even earlier than Terry, this Court in Brinegar v. United States, 338 U.S. 160 (1949), recognized, "In dealing with probable cause, however, as the very name applies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act . . . Probable cause exists where the 'facts and circumstances within their (the officer's) knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." Brinegar, supra at pp. 175-176.

The issue presented by Petitioner is whether a law enforcement officer has reasonable suspicion to stop an individual for identification if that individual appears to fit within the framework of the "drug courier profile." Do the various components of the "drug courier profile" when put together, in part or in total, constitute sufficient operative objective facts which give rise to reasonably suspicious activity so as to justify an investigative stop for identification by a law enforcement officer? Respondent submits that this must be answered in the affirmative. In United States v. Brignoni-Ponce, 422 U.S. 873 (1975), this Court indicated that in deciding whether to stop an individual, the individual's behavior would be relevant, such as if the individual made obvious attempts to evade law enforcement officers, and such behavior can support reasonable suspicion. However, in Brignoni-Ponce, supra, this Court said that the mere fact that the individuals in the automobile had a Mexican appearance, standing alone, did not justify a stop.

Respondent agrees that it takes more than one factor to constitute an articulable or reasonable suspicion which will serve

as the basis for an investigative seizure. Respondent believes that this Court in Brignoni-Ponce, supra, did not dispense with the fact that a law enforcement officer in all situations is entitled to assess facts in light of his experience in detecting illegal entry or smuggling in determining whether there is a reasonable suspicion to stop a car or to stop an individual for identification. Respondent believes that this Court's recent pronouncements in Delaware v. Prouse, supra; Torres v. Puerto Rico, supra; and Brown v. Texas, supra, have not led to a holding that law enforcement officers based upon their training are to disregard conduct which would be wholly innocent to an untrained observer, but to the eye of a seasoned officer would indicate the serious likelihood that criminal activity is afoot. Brown v. Texas, supra, n. 2.

In Brinegar v. United States, supra, Mr. Justice Burton in his concurring opinion indicates that law enforcement officers must draw upon their experience in determining whether to stop an individual for identification.

> In my view, these earlier events not only justify the steps taken by the government agents but those events imposed upon the government agents a positive duty to investigate further, in some such manner as they adopted. It is only by alertness to proper occasions for prompt inquiries and investigations that effective prevention of crime and enforcement of law is possible. Government agents are commissioned to represent the interests of the public in enforcement of the law and this requires affirmative action not only when there is

> reasonable ground for an arrest or probable cause for a search but when there is reasonable ground for an investigation. This is increasingly true when the facts point directly to a crime in the course of commission in the presence of the agent. Prompt investigation may then not only discover but, what is still more important may interrupt the crime and prevent some or all of its damaging consequences. Id. at p. 179.

Respondent submits that with rapidly unfolding drug traffic being conducted through this nation's airports police response must be accordingly flexible. This response is envisioned in the "drug courier profile," which is based upon specific objective criteria of drug enforcement people in their experience in shutting down drug traffic. Terry v. Ohio, supra, recognizes that a stopping for identification when based on reasonable suspicion is not an unreasonable seizure. Terry, supra, as in this case, deals with a series of acts which of themselves appear innocent, but when taken together warrant further inquiry. In fact, this Court in Adams v. Williams, 407 U.S. 143 (1972), stated,

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary Terry recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual, in order to determine his identity or to maintain

> the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time. Id. at 145-146; accord, United States v. McDaniel, 550 F.2d 214, 217 (5th Cir. 1977).

The initial stop of the Petitioner was not to look for drugs, but was for the purposes of obtaining his identity, because Petitioner's conduct matched with certain of the elements contained in the "drug courier profile" thus, providing a reasonable basis of suspicion that Petitioner was engaged in the crime of transporting illegal drugs. Respondent recognizes that under Sibron v. New York, 392 U.S. 40 (1968), a Terry frisk to look for drugs is improper. However, in this instance there was no frisk, but rather there was a Terry stop which was subsequently followed by a voluntary consent to search. See generally, Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

Accordingly, Respondent submits that the "drug courier profile" contains sufficient objective facts upon which to stop an individual for the purposes of obtaining identification. As Respondent noted, this Court in Brown v. Texas, supra, at n. 2, seems to indicate that a trained and experienced law enforcement officer may be entitled to stop an individual for questioning when that conduct to the untrained eye appears to be wholly innocent. More importantly, there was more than just the fact that Petitioner got off a plane from a city from which drug traffic is known to originate. Petitioner's initial conduct fulfilled several parts of the "drug courier profile." The elements of the drug profile are not subjective, but are objective factors based upon the experience of trained and seasoned

law enforcement officers. The stopping of the Petitioner is nowhere near as egregious as that in Davis v. Mississippi, 394 U.S. 721 (1969), wherein this Court found that the stopping of Davis was for questioning as a potential suspect. Petitioner's conduct was more than that of a potential suspect, but was a detention based upon the reasonable suspicions of a trained law enforcement officer who used objective criteria embodied in the "drug courier profile."

Furthermore, as this Court noted in Terry v. Ohio, supra, at p. 19, n. 16, "not all personal intercourses between policemen and citizens involves 'seizures' of persons." In looking at the totality of the circumstances as revealed by the record, see, Beck v. Ohio, 379 U.S. 89, 91 (1964), the initial stopping of the Petitioner was not unreasonable seizure. See also, United States v. Smith, 574 F.2d 882 (6th Cir. 1978); United States v. Lewis, 556 F.2d 386 (6th Cir. 1977), cert. denied, 434 U.S. 985 (1978); United States v. Scott, 545 F.2d 38 (8th Cir. 1976), cert. denied, 429 U.S. 1066 (1977); United States v. Riggs, 474 F.2d 699 (2nd Cir. 1973), cert. denied, 414 U.S. 820 (1973); United States v. Allen, 421 F.Supp. 1372 (D.C. Mich. 1976).

Furthermore, this Court may properly conclude that with the initial stopping being a reasonable seizure, the fact Petitioner was discovered to be traveling under a false name colored conduct which might have appeared to the untrained observer to be innocent. Respondent respectfully submits this Court should conclude that on the basis of the operative facts and those particular portions of the "drug courier profile" which were used by the law enforcement officer in this case, the initial stopping for identification does not constitute an unreasonable seizure.

CONCLUSION

This Court should refuse to grant a writ of certiorari because no sufficient reasons for review have been set forth by the Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Harrison Kohler, Attorney of Record for Respondent and a member of the Bar of the Supreme Court of the United States, certify that in accordance with the rules of the Supreme Court of the United States, I have served a true and correct copy of this Brief for Respondent upon Petitioner by depositing a copy of the Brief in the United States mail, with proper address and adequate postage to:

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This 19th day of December, 1979.

HARRISON KOHLER